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IN THE

Supreme Court of the United States

No. 404

In the Matter

—of—

DEPENDABLE MERCHANDISE CORP.,
Bankrupt.

BENJAMIN BROWNSTEIN,
Successor Trustee-Petitioner.

—vs.—

ALUMINUM RESERVE CORP., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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DEPENDABLE MERCHANDISE CORP.,
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BENJAMIN BROWNSTEIN,
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ALUMINUM RESERVE CORP., ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on May 27th, 1937.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is not reported, but is reproduced in the appendix, *infra* (p. 12). The opinion of the United States District Court, Southern District of New York, has not been reported, but is reproduced in the appendix, *infra* (p. 13). The opinion of the Referee in bankruptcy has not been reported but is reproduced in the appendix, *infra* (p. 16).

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on May 27th, 1937 (appendix, *infra*, p. 11). The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254 (1).

Questions Presented.

1. Is payment to the attorney for a trustee in bankruptcy pursuant to a judicially approved settlement, payment to the trustee in compliance with the Referee's order?

2. Is payment to a firm of attorneys not retained by the trustee, payment to the trustee in bankruptcy in compliance with the Referee's order?

3. Is estoppel a sufficient defense as against a trustee in bankruptcy?

Statutory Provisions Involved.

1. General Order 44, 11 U. S. C. A., foll. Sec. 53 deals with the procedure to be followed by trustees in bankruptcy in retaining attorneys insofar as pertinent, as follows:

> "No attorney for a receiver, trustee or debtor in possession shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge of all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys * * *."

2. 11 U. S. C. A., Sec. 102 (c), dealing with the sharing of fees by non-retained members of the trustees' attorneys' firm insofar as pertinent as follows:

> "A custodian, receiver, or trustee, or the attorney for any of them, or any other attorney, rendering services in a proceeding under this title or in connection with such proceeding, shall not in any form or guise share or agree to share his compensation for such services with any person not contributing thereto, or share or agree to share in the compensation of any person rendering services in a proceeding under this title or in connection with such proceeding, to which services he has not contributed: PROVIDED, HOWEVER, that an attorney-at-law may share such compensation with a law partner or with a forwarding attorney-at-law, and may share in the compensation of a law partner."

Statement of the Case.

The proceeding below was instituted by the successor trustee's motion for an order adjudging certain payments purportedly made by the respondents to the then trustee in bankruptcy, aggregating $13,000.00 in attempted compliance with a prior order of the Honorable Referee Irwin Kurtz, dated June 16th, 1955, to be null and void, and for a further order compelling respondents to pay to the successor-trustee the sum of $14,000.00 as required by the order of June 16, 1955.

The motion was made on two grounds. First, that payment to an attorney for a trustee in bankruptcy was not payment to the trustee in compliance with the Referee's order which by its terms adopted the language of the letter dated February 18th, 1955 from the respondents' attorney to the then attorney of the trustee, and secondly, that even if payment to the trustee's attorney was proper, payment to the firm of Reich, Peller, Guadagno & Caine, who were not the trustee's attorneys and were never approved by the Referee as such, was improper and void.

A hearing on the successor-trustee's motion was held before the Referee on June 6th, 1956. At said hearing the only witness was the predecessor trustee, Charles J. Nager, Jr., who testified to the facts and circumstances of his relationship with his then attorney, A. Alan Reich (whom he had retained pursuant to General Order 44), in regard to the judicially approved compromise of a certain action in which the bankrupt estate was plaintiff, and the respondents herein were defendants.

Said action was settled and the terms of the settlement were embodied in letters from the respondents' attorney to A. Alan Reich and from Reich to respondents' attorney, and incorporated by specific reference in the Referee's order of June 16th, 1955.

It will be noted that the respondents' final offer of settlement which was accepted by the trustee and approved by the Referee, contains the following language:

> "My clients offer to pay to Charles J. Nager, Jr. as trustee in bankruptcy, the sum of $13,000.00 in full settlement of the above action."

It should also be observed that the respondents in all correspondence with the trustee's attorney, A. Alan Reich, never used the name of Reich's firm, none of whose members had ever been retained by the trustee. No order approving such retention was ever granted by the Referee. It was the trustee's testimony that in fact he never had any dealings with any member of Reich's firm other than with Reich himself.

Negotiations for settlement culminated in the order of June 16, 1955, the terms of which were embodied in letters dated February 18, 1955, from Samuel Nachwalter (attorney for the respondents) to A. Alan Reich and April 13, 1955 from A. Alan Reich to Samuel Nachwalter.

The first payment, pursuant to the terms of said settlement, which accompanied the delivery of the offer of February 18, 1955, was a check of (one of the respondents)

Aluminum Reserve Corp., made payable to A. Alan Reich as attorney. The next check, dated June 21, 1955 in the sum of $4,000., was made payable to Reich, Peller, Guadagno & Caine, as attorneys, and thereafter eight Aluminum Reserve Corp. checks of $1,000 each in regular monthly intervals, totaling $8,000., were made payable to Reich, Peller, Guadagno & Caine, as attorneys.

The proceeds of the aforementioned ten checks, in the total sum of $13,000., never reached the trustee or the trustee's special account. The then trustee's attorney A. Alan Reich, absconded with the said $13,000.

On March 2nd, 1956 the trustee became aware of Reich's defalcations and wrote to the attorney for the respondents requesting that the final two monthly payments be made directly to him since Reich was no longer his attorney.

The Referee denied the motion by his decision dated August 2nd, 1956 (appendix, *infra*, p. 16), and an order was entered thereon dated August 16, 1956. No separate findings were made.

The Referee's opinion held that the ordinary rule which cloaks attorneys with authority to receive the proceeds of settlements, is extended to attorneys for fiduciaries to-wit, trustees in bankruptcy and further, that the checks payable to the firm were the equivalent of payment to the retained attorney, A. Alan Reich.

A petition to review the Referee's order of August 16, 1956 was filed on August 20th, 1956 by the successor-trustee with the Referee who certified the record to the United States District Court for the Southern District of New York on September 19th, 1956.

The petition for review was denied by the District Court by an opinion dated October 18th, 1956 and an order was entered thereon on November 9th, 1956 confirming the Referee's order.

The Court of Appeals for the Second Circuit affirmed the judgment of the Court below on May 27th, 1957.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals for the Second Circuit in conferring blanket authority on an attorney for a trustee in bankruptcy to receive estate funds, has decided an important question of Federal Bankruptcy Law upon which this Court has never passed directly or indirectly and which should be settled by this Court.

As was so aptly stated by the Honorable Referee in his opinion below:

> "This case arises as the aftermath of a most regrettable dereliction in duty of a member of the Bar of this court." (Appendix, *infra*, p. 16.)

Despite the relative antiquity of the Bankruptcy Statutes and the concomitant control of fiduciaries and their attorneys necessarily exercised by the Federal court, this court has never considered the questions raised herein. This fact is illustrated by a portion of the Referee's opinion in denying the successor-trustee's motion, as follows:

> "The successor-trustee urges that this is not the ordinary case and that irrespective of the extent of an attorney's authority to receive payment generally, an attorney for a trustee in bankruptcy has no such authority. No precedent for this limitation of authority has been cited." (Appendix, *infra*, p. 20.)

In fact, research has unearthed only two Federal cases which are even remotely connected to the issue raised in petitioner's first question.

In *In Re Howard*, 130 F. 1004, the court decided against the trustee because the order involved therein specifically and unequivocably permitted payment to the trustee's attorney and therefore the questions being urged upon this court did not arise.

In *Shapiro* v. *Capital Bakers, Inc.*, 17 F. Supp. 3 the issue was decided on the basis of authority conferred on the attorney for the trustee by the language of the deed placed in the hands of the trustee's attorney.

It is clear that no Federal court has ever had occasion prior to the instant case to decide whether an attorney for a trustee in bankruptcy should be cloaked with authority equivalent to that which cloaks an attorney acting for an ordinary client, insofar as the power to receive funds is concerned.

State courts when dealing with other varieties of fiduciaries, have consistently restricted the apparent authority of such attorneys to receive moneys on behalf of their fiduciaries by holding that third parties who make payments to such attorneys, do so at their peril. (See: *Howadle* v. *Stafford*, 263 N. Y. 334, in connection with attorneys for guardian-ad-litems and *Berkowitz* v. *Horowitz*, 250 App. Div. 728, 293 N. Y. S. 450, dealing with attorneys for administrators of decedents' estates.)

The opinion of the Referee and of the Circuit Court of Appeals for the Second Circuit, both refuse to extend the limitation so placed on attorneys for other fiduciaries to the case of an attorney for a trustee in bankruptcy.

However, no meaningful distinction between trustees in bankruptcy and other fiduciaries has been offered for judicial consideration. It is submitted that attorneys retained by trustees and receivers in bankruptcy (offices created by the Federal Bankruptcy Statute and administered under the careful guidance of the Federal courts) should be held to similar limitations as are imposed on attorneys for fiduciaries generally. (See: *Snider* v. *W. Renner*, 133 Misc. 352, 279 N. Y. S. 384; *Helgeson* v. *Farmers Ins. Exchange*, 116 Cal. App. 2d 825.)

If importance, in terms of this proceeding is to be defined by the total sum of the funds passing through trustees in bankruptcies hands, the answer is obvious. If importance is measured by the sanctity of the trust imposed on such

fiduciaries, surely the instant situation deserves a finite ruling which will serve as a guidepost for the many trustees in bankruptcy.

We believe that the issues evoked by this case are timely and unsettled and are of heavy significance in view of the increasing traffic in the bankruptcy courts engendered by the high powered commercial world of today.

It is our position that the writ should issue to afford an opportunity for this Court to examine at length what we believe to be the deleterious effect on the orderly administration of the bankruptcy statutes, which the lower Court's decision herein will have.

II.

The United States Court of Appeals for the Second Circuit in sustaining the authority of a firm of attorneys who had not been retained by the trustee to receive funds on behalf of the trustee, has decided a federal bankruptcy question never decided by this Court in a way in derogation of the manifest purpose of the applicable federal statutes, to wit: General Order 44, 11 U. S. C. A., Foll. Sec. 53 and 11 U. S. C. A., Sec. 102(c).

General Order 44 clearly disables any attorney from acting on behalf of the trustee in bankruptcy unless and until such attorney has complied with General Order 44 and the order of the Referee has been granted. (*In re H. L. Stratton*, 31 F. 2d 884, cert. den. 52 Sup. Ct. 188, 284 U. S. 682; *In re Rogers-Pyatt Shellac Co.*, 31 F. 2d 886, affirming 43 F. 2d 206; *In re National Food Mfrs.* 300 F. 2d 537.)

The unmistakable effect of the court's decision below is to obviate the strict mandate of General Order 44 by validating payments by the respondents to a firm of attorneys whom the respondents knew not to have been retained by the trustee. In fact, they never acted for the trustee, with the exception of receiving the moneys involved herein.

As Justice Augustus Hand cogently stated in the Stratton case, supra,

> "Though the attorneys manifestly acted in good faith, their procedure was in disregard of the rules made to safeguard insolvent estates * * *. We cannot too emphatically assert that the rules (the General Orders) are to be strictly observed and that oral statements made to a judge are no lawful substitute for the affidavits which are prescribed."

We are presented by the affirmance below with a situation in which attorneys admittedly not properly representing the trustee or the estate, were deemed to constitute an entity equivalent to the attorney properly retained.

11 U. S. C. A., Sec. 102(c) clearly reveals the well constructed pattern of protection given to the estate from unscrupulous attorneys. Its language indicates that only as far as the division of fees is concerned, may members of a firm other than a member retained by a trustee, participate in the representation.

We strenuously urge that this decision goes far to overrule or weaken the salutary principles laid down in the *Stratton*, *Rogers* and the *National Fuel* cases, *supra*.

As Justice Augustus Hand said in the Stratton case, *supra*:

> "The rules were made by courts for the protection of the bankrupt estate and no neglect of private litigants to questions of payment can create estoppel."

Although the cases discussed herein involve the question of attorneys' fees, the scope and purpose of the principle of these cases and the General Orders themselves, is certainly of a much broader nature. There can be no doubt that bankrupt estates which in reality mean the general creditors were the parties for whose benefit and protection the General Orders and allied statutes were promulgated.

We respectfully submit that it is a fallacy to dispose of this phase of the case on a cause and effect basis, as illustrated by the following from the Circuit Court's opinion:

> "If anything such a form of payment may have made it more difficult for Reich to misappropriate the funds." (Appendix, *infra*, p. 14.)

As previously noted, the issues in the Stratton and Rogers cases, *supra*, were decided without regard for the fact that the attorneys serving the estates actually performed in a professional and meritorious fashion. Fees were denied the attorneys because the statutes and in particular, General Order 44, were found to be violated and not because their services had any adverse effect on the bankrupt estates.

CONCLUSION.

Since this case involves fundamental federal bankruptcy questions which should be settled by this Court, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of May, one thousand nine hundred and fifty-seven.

Present: HON. CHARLES E. CLARK,
Chief Judge.

HON. J. EDWARD LUMBARD,
Circuit Judge.

HON. VINCENT L. LEIBELL,
District Judge.

IN RE DEPENDABLE MERCHANDISE CORP.,
Bankrupt.

BENJAMIN BROWNSTEIN,
Successor Trustee-Appellant,

ALUMINUM RESERVE CORP., ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX B.

Opinion by Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 301—October Term, 1936.

(Argued April 4, 1937 Decided May 27, 1937.)

Docket No. 24430

BENJAMIN BROWNSTEIN,
Successor Trustee-Appellant,

—v.—

ALUMINUM RESERVE CORP., ET AL.,
Respondents-Appellees.

Before CLARK, *Chief Judge*,

LUMBARD, *Circuit Judge* and LEIBELL, *District Judge*.

Appeal from an order of the United States District Court for the Southern District of New York, John F. X. McGohey, *D.J.*, confirming the order of a referee in bankruptcy that payments by the bankrupt's debtor to the attorney for the trustee were not null and void. Affirmed.

NATHAN R. FINKELSTEIN, New York, N. Y.,
for successor trustee-appellant.

SAMUEL J. NACHMALTER, New York, N. Y.,
for respondents-appellees.

LUMBARD, *Circuit Judge*:

This is an appeal from Judge McGohey's affirmance of a bankruptcy referee's refusal to adjudge "null and void"

payments totalling $13,000 made by the debtor of the bankrupt. The checks in payment were drawn to the order of the trustee's attorney and to his law firm and the attorney misappropriated the funds.

Charles T. Nager, the bankrupt's first trustee, commenced an action on behalf of the bankrupt against Aluminum Reserve Corp. Nager had retained A. Alan Reich, the senior member of Reich, Peiber, Guadagno & Caine, as his attorney, and proper orders of retention had been entered. On February 18, 1953 Aluminum proposed a settlement of the litigation for $15,000 and a $1,000 check was tendered as a first payment. This check was made out to the order of "A. Alan Reich, attorney." A special meeting of creditors accepted the offer and tender of the $1,000 check, and an order of approval was filed June 16, 1953. The check was then endorsed by Reich and by his law firm and deposited in the firm's special account. Thereafter, a check for $4,000, made out to Reich, Peiber, Guadagno & Caine was endorsed by the firm and deposited in its special account. Eight more checks of $1,000 each were made out to the firm and deposited in the same way.

Reich misappropriated these funds and when Nager learned of this he asked Aluminum on March 2, 1956 to send the remaining $2,000 to him. A check of $1,000 was sent to him, as trustee.

Prior to April 30, 1956, Nager resigned as trustee and was succeeded by Abraham I. Mesin. When the next and final $1,000 check came in, marked in final payment, Mesin refused it and claimed that the $13,000 misappropriated by Reich would not be credited to Aluminum's debt since it should have sent the money to the trustee and not to Reich.

The successor trustee moved for an order adjudging the $13,000 payments null and void, on the grounds that (1) money owed to a bankrupt must be paid directly to the trustee and not to his attorney; (2) in any event, the checks should have been made payable to the attorney retained by the trustee and not to the attorney's law firm. Referee

Irwin Kurtz who had approved the settlement, held that an attorney retained by a trustee in bankruptcy to recover on certain claims of the bankrupt has authority to receive payments for those claims on behalf of the trustee. He therefore denied the motion and his order was confirmed by Judge McGohey.

The referee's ruling was correct. No valid reason has been advanced for making an exception to the general rule that payment to an attorney of a claim which he is employed to recover or collect operates as payment to the client himself, absent specific contrary arrangements. *See McCoy v. Mayerhoff*, 265 N. Y. Supp. 130, 230 App. Div. 682 (3 Dept. 1932); *cf. In re Howard*, 130 Fed. 1004, 1006 (N. D. Cal. 1904). The fact that the principal in this case is a fiduciary acting on behalf of creditors does not justify such an exception, and we see no reason to extend the statutory exception requiring payment directly to a guardian *ad litem* on an infant's personal injury claim. N. Y. Civ. Prac. Act, § 208-a; Rules of Civ. Pr. Rule 41. *See Manaolo v. Stafford*, 265 N. Y. 334 (1934). There is no analogous provision in the Bankruptcy Act, and there is no reason for us to write it in.

Nor do we see any grounds for holding these payments null and void because the checks were payable to the law firm rather than to Reich personally. No additional harm resulted from this. If anything, such a form of payment may have made it more difficult for Reich to misappropriate the funds.

An additional reason for refusing to hold the payments null and void is that the trustee's acceptance of all the checks payable to Reich and his law firm, including the first one tendered with the settlement offer and which was also payable to Reich, estops the successor trustee from objecting after the misappropriation. A trustee in bankruptcy can be estopped to the same degree as any other party, *see Lee-son v. First State Bank*, 21 F. 2d 302, 303 (8 Cir. 1927). The cases cited by the successor trustee for the contrary view all deal with situations where the actions on which it

was sought to raise an estoppel were outside the trustee's powers. See e.g. Newport v. Simpson, 223 F. 2d 944 (9 Cir. 1955). That is not the situation here for there is nothing in the Bankruptcy Act which forbids a trustee from authorizing his attorney to accept payment of debts owed to the bankrupt.

Affirmed.

APPENDIX C.

Opinion by McGohey, D.J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Bankruptcy No. 88783.

In the Matter

—of—

DEPENDABLE MERCHANDISE CORP.,

Bankrupt.

McGOHEY, *D.J.*:

The successor to the original trustee seeks review of an order of the Referee dated August 16, 1956. The order denied the successor trustee's motion to declare "null and void" payments totaling $13,000 which, with the predecessors trustee's knowledge and acquiescence over a period of almost ten months were concededly made to the order of and received by his attorney in settlement of a claim of the estate. The attorney, unknown to the trustee, misappropriated the funds to his own use and took them. He is now under indictment and awaiting trial.

The Referee held a hearing on the motion. He heard testimony by the predecessor trustee, and received briefs from the attorneys of the successor trustee and the payee of the $13,000. Thereafter he filed an opinion in which he set forth the findings of fact and conclusions on which he based his denial of the motion.

The order under review is in all respects affirmed.

Settle Order.

Dated: New York, N. Y., October 18, 1956.

JOHN F. X. McGOHEY,
U. S. D. J.

APPENDIX B.

Opinion by Irwin Kurtz, Referee in Bankruptcy.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

(In Bankruptcy)
(No. 88783)

In the Matter
—of—
DEPENDABLE MERCHANDISE CORPORATION,
Bankrupt.

This case arises as the aftermath of a most regrettable dereliction in duty of a member of the Bar of this Court. The infrequency with which these incidents arise in our

Court makes this the exception that proves and tests the rule of probity that prevails generally.

Abraham I. Monin, as successor trustee, initiated this proceeding for an "Order adjudging the payments made by Aluminum Reserve Corp., aggregating $12,000.00, in attempted compliance with the Order of this Court dated June 16, 1953, to be null and void and for a further Order compelling Aluminum Reserve Corp., Mark Sands and David Rhane to pay to the successor trustee herein the sum of $14,000.00, as required by the Order of June 16, 1953."

The facts are as follows: Charles J. Nager, predecessor trustee of the bankrupt, commenced an action against Aluminum Reserve Corp., Mark Sands and David Rhane, also known as David Rhuenstein (hereinafter called "the Aluminum Litigation"). Prior to his election as trustee, Mr. Nager had served as receiver of the bankrupt estate. As receiver and, subsequently, as trustee, Mr. Nager had retained A. Alan Reich as his attorney. Proper orders of retention had been entered in each case. Mr. Reich was the attorney of record in the Aluminum Litigation.

The defendants in the Aluminum Litigation made a written offer of settlement by letter, dated February 18, 1953, written to A. Alan Reich. This settlement offer was amended by a subsequent letter, dated April 13, 1953, written by Mr. Reich to Samuel J. Nachwalter, the attorney for the named defendants in the Aluminum Litigation. This letter was also signed by the parties to the proposed settlement.

A special meeting of creditors to consider the offer as amended, was held and there being no opposition thereto the offer was approved. The order of approval, dated June 16, 1953, read as follows:

> ORDERED, that Charles J. Nager, Trustee in Bankruptcy herein, be and he hereby is authorized to settle and compromise the controversy with Aluminum Reserve Corp., Mark Sands, and David Rhane, also known as David Rhuenstein, by accepting the terms of the offer contained in the offer and tender, dated Feb-

ruary 18th, 1953, as supplemented by the letter agreement, dated April 13th, 1953, and to execute all instruments necessary to effectuate said settlement."

The original offer of February 18, 1953 had been accompanied by a $1,000 check of Aluminum Reserve Corp. to the order of "A. Alan Reich, attorney." This check was endorsed "A. Alan Reich, attorney," in handwriting and underneath this handwritten endorsement was a rubber stamp endorsement reading as follows:

"Ry Reich, Peller, Guadagno & Caine, attorneys

Pay to the order of
Bank of the Manhattan Company

Reich, Peller, Guadagno & Caine
Special #1"

Following the entry of the order of June 16, 1953 a check of Aluminum Reserve Corp. in the amount of $4,000 was issued to "Reich, Peller, Guadagno & Caine, as attorneys." On the reverse side of this check there was typed the following legend:

"Payment in pursuance of order of Referee Kurtz, covering agreement effected with trustee re Dependable Merchandise"

Underneath this legend there was a rubber stamp endorsement as follows:

"81 Pay to the order of 81
Bank of the Manhattan Company

Reich, Peller, Guadagno & Caine
Special Account #1"

This check was deposited in the Bank of the Manhattan Company.

At regular monthly intervals eight additional $1,000 checks were issued to Reich, Peller, Guadagno & Caine, as attorneys.

All bore the same legend, and all except the last check were deposited in Special Account #1 maintained by the said law firm with the Chase Manhattan Bank. The last check was deposited in Manufacturers Trust Company.

On March 2, 1956 Charles J. Nager, the predecessor trustee, wrote to the attorneys for the defendants in the Aluminum Litigation, requesting that all future monthly payments (at that time there remained only two) be made to him since Mr. Reich was no longer his attorney. By that time Mr. Nager had been informed by Mr. Reich that the latter had appropriated to his own use the entire $13,000 previously collected and had lost it.

A check in the amount of $1,000 dated March 21, 1956, of Aluminum Reserve Corp., to the order of "Charles J. Nager, Trustee in Bankruptcy," was received and deposited by the trustee in his account as trustee of the estate. Including this check, the aggregate payments made by Aluminum Reserve Corp., amounted to $14,000.

Prior to April 30, 1956 Mr. Nager resigned as trustee and Abraham I. Menin succeeded him. On April 30, 1956, what was designated by the drawer as a check representing final payment was tendered, said check being in the amount of $1,000 to the order of Mr. Nager. Mr. Nager advised the attorney for Aluminum Reserve Corporation that he was turning the check over to Abraham I. Menin, the successor trustee.

Shortly thereafter Mr. Fogelson, attorney for the successor trustee, returned the check to the attorney for Aluminum Reserve Corp. with a covering letter, in which he refused to accept this $1,000 check as final payment. This proceeding followed almost immediately thereafter.

The respondents, in their answer, have denied certain allegations of the successor trustee's petition and have asserted defenses of estoppel, equitable estoppel, and a defense that this court has no power to adjudicate this controversy.

Notwithstanding the denials of the respondents, there is no material allegation of fact that is in issue. The resolution of this controversy poses questions of law exclusively.

With respect to the affirmative defense that challenges this court's power to adjudicate this controversy, I find and hold that this court has inherent power to compel compliance with settlement offers that have been submitted and approved. I, therefore, dismiss the respondent's "third, separate, distinct and affirmative defense."

It is unquestioned that in an ordinary case an attorney has authority to receive payment of debts or claims which he is retained to recover or collect. The successor trustee urges that this is not the ordinary case and that irrespective of the extent of an attorney's authority to receive payment generally, an attorney for a trustee in bankruptcy has no such authority. No precedent for this limitation of authority has been cited. I am unwilling to extend the exception which is said to prevail in the case of a guardian ad litem to that of a trustee in bankruptcy.

The first check that accompanied the offer of settlement of February 18, 1953 was payable to the order of Mr. Reich. No point was made of this at the time, and certainly the respondents were justified in their belief that a proper initial payment had been made.

The successor trustee urges, further, that even though the first payment to the order of Mr. Reich, as attorney, were to be considered a proper payment, the $12,000 that was paid subsequently was evidenced by checks to the order of Reich, Peller, Guadagno & Caine, as attorneys, and that the firm as such did not represent the trustee.

It is the fact that Mr. Reich and not the firm of which he was a member was named as attorney for the trustee in the order of retention. This objection poses a more serious problem and, again, no precedent has been called to my attention as to whether a payment to a firm, of which the attorney who was retained by a trustee in bankruptcy pursuant to order of the court is a member, is the equivalent of payment to the named attorney.

All of the evidence in the case establishes that Mr. Reich was one of the senior partners, if not the senior partner, in the firm of Reich, Peller, Guadagno & Caine. Correspondence

was conducted on the firm's letterhead, even though signed by Mr. Reich alone or on his behalf.

I have come to the conclusion that the payment to the firm under the circumstances in this case were proper. It has not been demonstrated that the designation of the firm, as payee of the $12,000 in checks, contributed in any way to Mr. Reich's defalcation, made that defalcation possible or facilitated it in any way.

In the case of the first $1,000 check which was made payable to the order of Mr. Reich, he endorsed that check over and deposited it in his firm's special account. The subsequent checks that were made payable directly to the firm, found their way into the same special account. The defalcation in both situations took place subsequent to deposit.

I hold that the aggregate payments of $14,000 previously made should properly be credited on account of the $15,000 settlement, and that the payment by the respondent of an additional $1,000 will constitute full compliance with the original settlement offer, as amended.

In so holding I add a caveat that this opinion is in no sense to be considered an adjudication with respect to any rights which the successor trustee may have against any persons other than the respondents in this proceeding.

Settle order on five days' notice.

Dated, New York, August 2d, 1956.

IRWIN KURTZ,
Referee in Bankruptcy.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 404

In the Matter

- of -

DEPENDABLE MERCHANDISE CORP.,

Bankrupt.

BENJAMIN BROWNSTEIN,

Successor Trustee-Petitioner,

- vs. -

ALUMINUM RESERVE CORP., *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SAMUEL J. NACHWALTER,
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220 Broadway,
New York, N. Y.

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Respondents.

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The respondents pray that the petition for a writ of certiorari be denied.

Opinions Below

The opinion herein of the Court of Appeals for the Second Circuit is reported in 243 F. 2d 82.

Questions Presented

The first two questions formulated by the petitioner are factually incomplete. To properly present the propositions they should read as follows:

1. Is payment to the attorney for a trustee in bankruptcy, pursuant to a judicially approved settlement of an action based on allegedly fraudulent transfers brought by the trustee against the respondents, payment to the trustee?

2. Is payment to a firm of attorneys whose senior partner was duly retained by the trustee, pursuant to a judicially approved settlement of an action based on allegedly fraudulent transfers, payment to the trustee?

Statutory Provisions Involved

The respondents maintain that neither General Order 44, 11 U. S. C. A. foll. Sec. 53, nor 11 U. S. C. A. Sec. 107 (c) is involved in this dispute. Respondents further maintain that these provisions have nevertheless been properly complied with.

Statement of the Case

The following additional facts are necessary to a proper discussion of the problem.

The payment of the $14,000 of the $15,000 the respondents agreed to make was the result of a settlement of an action instituted by the trustee against the respondents in the United States District Court,

Southern District of New York. The action was based on allegedly fraudulent transfers, and the trustee sought to have them declared null and void, to make respondents account, and to recover a money judgment.

A. Alan Reich was the attorney of record for the trustee in this litigation. A. Alan Reich at that time was also one of the senior partners, if not the senior partner, in the firm of Reich, Peller, Guadagno and Caine.

All the payments made by the respondents, even the one payable to A. Alan Reich alone, were received by A. Alan Reich, deposited by him in the firm account, and then misappropriated by him. The trustee knew that the payments were being made by the respondents and relied on the writing of A. Alan Reich, his attorney, that they were properly deposited in the account of the trustee. In his interim report to the Referee the Trustee acknowledged payments by Aluminum Reserve Corporation of $10,000, pursuant to the stipulation of settlement.

REASONS FOR DENYING THE WRIT

I.

There is no federal bankruptcy law question which this Court will be called upon to review.

From the inception of this controversy the attorney for the petitioner has misconstrued the basis of respondents' contention. The respondents emphatically again urge that there is no Federal Bankruptcy statute involved in the case at hand. The action instituted by the trustee against these respondents was one at law or in equity, not bankruptcy. Consequently, the relationship of the litigants was controlled by the same general principles of law.

The question is not novel to this Court. In the case of *Lowenstein v. Evans et al.*, 54 F. (2d) 481, certiorari denied in 285 U. S. 539, 52 S. Ct. 311, the distinction between the two types of cases was clearly defined. The Court of Appeals, at page 484, said:

> "* * * Suits for the recovery of fraudulent and preferential transfers of property in possession of third parties, who claim adversely, are not proceedings in bankruptcy, but are controversies at law or in equity."

Thus, if bankruptcy law did not control the litigation, how can it logically be brought into play upon its conclusion? Furthermore, why then should the relationship of attorneys be controlled by it?

Respondents have contended throughout this litigation that the law applicable to this controversy is governed by the general principles of law and equity. Under the universal rule throughout the jurisdictions of this country an attorney is authorized to receive payment of a debt or claim which he is employed to recover by suit or to collect. 3 *American Jurisprudence* 299, Sec. 69; *McCoy* v. *Barclay*, 230 App. Div. 682; *Stratton* v. *Graham*, 164 App. Div. 348; *In re Howard*, 130 F. 1004; *Shapiro, et al.* v. *Capital Bakers, Inc.*, 17 F. Supp. 3. Respondents have found no authority to the contrary, nor has petitioner cited any. Contrary to the contention of the petitioner, it is apparent that there is no Federal statute which this Court will be called upon to review.

In re Howard, 130 F. 1004, bears out respondents' contention that where an attorney represents a client in litigation he is authorized to collect the debt.

Petitioner argues that in the *Howard* case the order provided for payment to the trustee's attorney. In the instant case the Referee who made the order undoubtedly intended that the general rule apply. He later when the petition herein came on before him, in effect also retroactively approved, by his opinion, payment to the attorney for the trustee. No precedent for such limitation of authority on the part of an attorney, the Referee held, was cited by the petitioner. *Shapiro* v. *Capital Bakers, Inc.*, 17 F. Supp. 3, is the second type of case in which an attorney is authorized to receive payment. There the attorney possessed the indicia of authority to collect.

The petitioner has consistently urged upon every court in this chain of litigation the unrelated principle followed in *Honodle* v. *Stafford*, 265 N. Y. S. 430; *Berlowitz* v. *Horowitz*, 230 App. Div. 728, 293 N. Y. S. 430, and *Snider* v. *Renner*, 155 M. 352. The prohibition against payment to anyone other than the guardian ad litem in the *Honodle* case was based on the specific rule contained in Section 980-a of the New York Civil Practice Act. The *Snider* and *Berlowitz* cases followed that rule too. The *Berlowitz* case is a memorandum opinion in which the facts are not detailed, but cites the *Honodle* case as authority. It must be assumed that an infant was involved in view of the additional statement in the case that the court approved the settlement, which would have been unnecessary had all the parties been adults. Obviously, the same principle is common to these cases. They are restricted to infants and controlled by Section 980-a of the New York Civil Practice Act.

In *Helgeson* v. *Farmers Ins. Exchange*, 116 Cal. App. 2d 923, also cited by petitioner, the determination of the court was controlled by the fact that the drawer of the draft had paid it over a forged endorsement and, therefore, was required to pay again. That question is not present here. Our question concerns itself entirely with whether payment to an attorney, or his law firm, in the course of litigation is payment to his client.

On general principles of law the firm also had authority to receive payment in the settlement of this action. Attorneys may form partnerships and such a partnership is but one person in law. *Mendelsohn* v.

Equitable Life Assurance Society, 178 Misc. 132; *McFarland* v. *Crary*, 8 Gow., 253; *Warner & Post* v. *Griswold*, 8 Wend. 665; *Lockwood* v. *Dillenbeck*, 104 App. Div. 71. If one member of a law firm is retained the entire firm is retained. *Ganzer* v. *Schiffbauer*, 40 Neb. 633; *Lupton* v. *Taylor*, 39 Ind. App. 412; *Lockwood* v. *Dillenbeck*, 104 App. Div. 71, and the employer is entitled to the services of all the members of the firm. *Williams* v. *A. P. Moore*, 63 Cal. 50. Consequently, the firm of attorneys had authority to receive the funds on behalf of the trustee where the senior member of the firm was the attorney of record in the action brought by the trustee against third persons, the respondents.

The same rules apply with equal force in the bankruptcy courts. The bankruptcy rules do not prohibit a firm from acting as attorneys for a trustee. The approval of A. Alan Reich by the bankruptcy court did not obliterate the fact that he was a member of a firm, nor did it cause a legal fission which split the firm into its component members. The Bankruptcy Law (Title 11, Sec. 102, 3c) recognizes the close relationship of the members of a firm and permits law partners to share in the compensation awarded to one of them. Payment, therefore, to the firm, both under general principles of law as well as under the Bankruptcy Act, was proper.

Insofar as our defense of estoppel is concerned, here again the petitioner has not shown a solitary reason for this Court to review the question. The dearth of authority offered by the petitioner is sufficiently significant to deserve no further comment.

Finally, respondents submit that the petitioner has not shown any merit to the present application. Certainly, the petitioner has not indicated any reason for considering a review of this case under any of the provisions contemplated by Rule 19 of the Rules of this Court. All the decisions are consistently adverse to every contention of the petitioner, and nothing has been shown that remains unsettled. Under these circumstances nothing remains for this Court to review. *Magnum Import Company, Inc.* v. *Coty*, 262 U. S. 159.

CONCLUSION

Since this case does not involve federal bankruptcy questions, but generally accepted principles of law and equity, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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